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TORT LIABILITY FOR MENTAL DISTURBANCE AND NERVOUS SHOCK.

In a celebrated case, which involved the liability of a railroad company, for negligently frightening the plaintiff and thereby impairing her health, her memory and her eyesight, the Privy Council treated the terms at the head of this article as interchangeable.[1] A learned English judge, dealing with this topic in a later case, has remarked:

> "I venture to think 'nervous' is probably the more correct epithet where terror operates through parts of the physical organism to produce bodily illness, as in the present case. The use of the epithet 'mental' requires caution, in view of the undoubted rule that merely mental pain, unaccompanied by any injury to the person, cannot sustain an action of this kind."[2]

Without attempting to settle this mooted question, let us consider briefly the present state of judicial decision, regarding the tort liability of a person for wrongfully subjecting another to fright, mental anguish or nervous shock.

[1] Victorian Railway Commissioners *v.* Coultas (1888) 13 App. Cas. 222; 57 L. J. P. C. 69: "Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the Gate-Keeper."

[2] Kennedy, J., in Dulieu *v.* White [1901] 2 K. B. 669, 672–3; 70 L. J. K. B. 837. The plaintiff's statement of claim, which was demurred to by the defendant, averred that while plaintiff was behind the bar of her husband's house, defendants' servant so negligently drove a "pair-horse van, as to drive it into the said house; that plaintiff in consequence sustained a severe shock," which made her seriously ill and caused the premature birth of a child. Both Kennedy and Phillimore, JJ., were of the opinion that the statement set forth a cause of action.

THE UNDOUBTED RULE.

Judge Kennedy's statement of the undoubted rule, quoted above, is taken from a text-writer of recognized ability;[1] but the learned judge did not think that the rule governed the case then before the court. He thought the rule might be accepted, and yet the following inquiry be left open; suppose A wrongfully subjects B to mental suffering, which causes palpable physical sickness, disabling B from attending to his ordinary business, and compelling him to incur expense for medical treatment; has B a cause of action against A?

This question appears to have presented itself first for extended judicial discussion in defamation actions; and that, too, in quite recent times. In one of the earliest reported cases on this topic,[2] the Supreme Court of New York said:

"In the case now before the court, the plaintiff alleges that she lost her health, and thereby became incapable of performing and transacting her necessary affairs and business. She does not indeed allege in terms a pecuniary loss, but alleges that which must necessarily involve such loss. It is said that the special damages must be the legal and natural consequence of the words spoken. On this point there is no difficulty; the question now arises upon the declaration, and the plaintiff expressly avers that 'by means of the speaking of which said several false, slanderous, malicious and defamatory words,' she sustained the damage already mentioned. The truth of this allegation is admitted by the demurrer. * * * The plaintiff is entitled to judgment on the demurrer."

This decision was followed in a later case,[3] but was finally overruled by the Court of Appeals in the leading case of Terwilliger *v.* Wands.[4] Said the court:

"It would be highly impolitic to hold all language, wounding the feelings and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend, often, upon whether the sensibilities of a person spoken of are easily excited or otherwise: his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them

[1] Beven. On Negligence (1895) 77.

[2] Bradt *v.* Towsley (1835) 13 Wend. 253. The court consisted of Savage, Ch. J., and Sutherland and Nelson, JJ. Defendant charged plaintiff with being a prostitute.

[3] Fuller *v.* Fenner (N. Y. 1853) 16 Barb. 333.

[4] (1858) 17 N. Y. 54; 72 Am. Dec. 420; affirming the same case in (1855) 25 Barb. 313.

* * * In the present case the words were defamatory,[1] and the illness and physical prostration of the plaintiff may be assumed to have been actually produced by the slander; but, this consequence was not, in a legal view, a natural and ordinary one, as it does not prove that the plaintiff's character was injured. * * * Such an effect may and sometimes does follow from such a cause but not ordinarily; and the rule of law was framed in reference to common and usual effects, and not those which are accidental or casual."

Two years later a similar case[2] came before the English Court of Exchequer and evoked the same answer. Pollock, C. B., said:

"This particular damage depends upon the temperament of the party affected, and it may be laid down that illness arising from the excitement, which the slanderous language may produce, is not that sort of damage which forms a ground of action."

Bramwell, B., said:

"The question seems to me one of some difficulty, because a wrong is done to the female plaintiff who becomes ill, and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck by what has been said as to the novelty of this declaration, that no such special damage ever was heard of as a ground of action. * * * There is certainly no precedent for such an action, probably because the law holds that bodily illness is not the natural consequence of the speaking of slanderous words. Therefore, on the ground that the damage here alleged is not the natural consequence of the words spoken by the defendant, I think the action will not lie."[3]

MENTAL ANGUISH ACCOMPANYING ACTIONABLE DEFAMATION.

While the doctrine of the foregoing decisions has been accepted generally, both in England and in this country, it is also agreed that in case of libel, or of slander actionable *per se*, sickness due to the plaintiff's mental distress, and even

[1] The words imputed incontinency to the plaintiff, but were not actionable *per se*.

[2] Allsop *v.* Allsop (1860) 5 H. & N. 534; 29 L. J. Exch. 315. Approved in Lynch *v.* Knight (1861) 9 H. L. C. 577.

[3] In McQueen *v.* Fulgham (1864) 27 Tex. 463, 469, a case also of slanderous words not actionable *per se*, the court declared that it could not "say as a matter of law, that the words of a ribald and malign slanderer may not prey like a cancer upon the mind and health of a sensitive and nervous female, until the one is unsettled and the other impaired and destroyed, much less, that pecuniary injury would not result from the loss of health, and the inability to discharge her ordinary and accustomed domestic labor."

the injury to his feelings, though not causing sickness, may be taken into account by the jury in assessing damages.[1]

A similar distinction has been made in cases where sexual intercourse has been solicited. An action will not lie, it is said, in favor of a woman against a man, who, without trespass or assault, solicits her to illicit intercourse, though the humiliation and mental distress "unnerved and damaged her."[2] But it will lie, if his solicitation amounts to a technical assault or trespass; and, in the latter case, the injury to feelings, the mental distress, as well as the physical sickness induced thereby, may be taken into account by the jury in assessing damages.[3]

Worry and Fright Caused by Defendant's Misconduct.

Where the consequences of the defendant's wrong-doing are limited to the mental disturbance of the plaintiff, and the wrong-doing is not actionable in behalf of the plaintiff, apart from such consequences, any harm sustained by the plaintiff is deemed *damnum absque injuria.* Thus far there is entire unanimity of decision. It is hardly to be expected, that any court would undertake to compensate a parent for the mental anguish, which he claims to have suffered, while his children were necessarily passing near a place where the

[1] Odgers, Libel and Slander, 3d ed. 353; Johnson *v.* Robertson (Ala. 1839) 8 Port 486; Swift *v.* Dickerman (1863) 31 Conn. 285; Pugh *v.* McCarty (1869) 40 Ga. 444; Dufort *v.* Abadie (1871) 23 La. Ann. 280; Wilson *v.* Noonan (1874) 35 Wis. 321; Zeliff *v.* Jennings (1884) 61 Tex. 458.

[2] Reed *v.* Maley (1903) 115 Ky. 816, 74 S. W. 1079.

[3] Newell *v.* Whitcher (1880) 53 Vt. 589, 38 Am. R. 703. The court charged the jury that, if the plaintiff was so frightened and shocked in her feelings, as to injure her health, by defendant's conduct, she should receive damages for such injury. The defendant's counsel asked the court to charge, in substance, that if defendant's acts and conduct would not have injured a person of ordinary nerve and courage, then there can be no recovery. On appeal, the Supreme Court upheld the charge and the refusal of defendant's request, declaring that as defendant's conduct amounted to an assault he must answer for all actual injuries, and affirmed a judgment for $225, including $100 for exemplary damages. Bruske *v.* Neugent (1903) 116 Wis. 488, 93 N. W. 454. Verdict for $500 upheld, the court saying: "The mere physical or pecuniary injury was, of course, insignificant; but the outrage to the feelings of a modest and chaste woman, resulting from the immoral solicitation which she testifies accompanied the assault, is such that we cannot feel justified in deeming the allowance of $500 so grossly excessive asto justify this court in interfering."

defendant was negligently blasting[1]; nor to compensate A for a shock to his nerves by the exhibition of negligence on the part of B towards the person of C, or towards the property of either A or C[2]; nor to compensate even a lawyer-colonel for "anxiety, worriment, etc., suffered on account of delay or of being separated from his baggage."[3]

When, however, worry or fright, occasioned by defendant's wrongful conduct, causes physical derangement, differences of opinion immediately develop, and it becomes impossible to reconcile the various judicial views of the wrong-doer's liability.

PHYSICAL DERANGEMENT CAUSED BY FRIGHT.

At one extreme, are the cases which hold that the right to recover for a physical injury, resulting from fright or mental anguish, depends on whether a recovery could be had for such fright or mental anguish alone.

"Assuming that fright cannot form the basis of an action," say these authorities, "it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright."[4]

At the other extreme, are the cases which hold that a re-

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[1] Wyman *v.* Leavitt (1880) 71 Me. 227, 36 Am. R. 303.

[2] Smith *v.* Johnson & Company, unreported, but referred to in Wilkinson *v.* Downton (1897) 2 Q. B. 57, 61, and approved in Dulieu *v.* White (1901) 2 K. B. 667, 675. And see, Linn *v.* Duquesne Borough (1903) 204 Pa. St. 551, 54 At. 341, where the court held that plaintiff was not entitled to damages for the regret and humiliation she would feel, because of the permanent injury to her hands.

[3] Turner *v.* Great Nor. Ry (1896) 15 Wash. 213, 46 Pac. 243.

[4] St. Louis, &c., Ry. *v.* Bragg (1901) 69 Ark., 402, 64 S. W., 226, 86 Am. St. R., 206; Braun *v.* Craven (1898) 175 Ill., 401, 51 N. E., 657, 42 L. R. A., 199; Kansas City Ry. *v.* Dalton (1902) 65 Ks., 661, 70 Pac. 645; Morse *v.* Chesapeake Ry. (Ky., 1903) 77 S. W., 362; Spade *v.* Lynn &c. Ry. (1897) 168 Mass., 285, 47 N. E., 88, 38 L. R. A., 512; Trigg *v.* St. Louis &c. Ry. (1881) 74 Mo., 147, 41 Am. R., 305; Ward *v.* West Jersey Ry. (1900) 65 N. J. L., 383, 47 At., 561; Mitchell *v.* Rochester Ry. Co. (1896) 151 N. Y., 107, 45 N. E., 354, 34 L. R. A., 781, 56 Am. St. R., 604; Ewing *v.* Pittsburgh &c. Ry. (1892) 147 Pa. St., 40, 23 At., 340, 14 L. R. A., 666, 30 Am. St. R., 709; Victorian Ry. Commissioners *v.* Coultas (1888) 13 App. Cas., 222, 57 L. J., 3 P. C., 69.

covery may be had for sickness, physical derangement or physical pain, resulting directly from fright or mental anguish caused by the defendant's wrongdoing; provided that the defendant would have been liable, had his misconduct caused the derangement, sickness or pain, without the intervention of the fright or mental disturbance.[1] In order to bring a case within the foregoing proviso, the plaintiff must show, not only that defendant's conduct was wrongful towards some one, but that it was a breach of legal duty owing to him by the defendant. Accordingly, if A is made sick by the shock of seeing another person maltreated, or of seeing his own property negligently injured,[2] he has no cause of action against the wrongdoer, as these facts fall short of establishing a breach of legal duty to the plaintiff by the wrongdoer.[3] For the law to furnish redress for mental suffering or its physical consequences, "there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property or some other legal interest of the party complaining. Neither one without the other is sufficient. This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right

[1] Fitzpatrick *v.* Great Western Ry. (1854) 12 Up. C. Q. B., 645; Bell *v.* Great Nor. Ry. (1890) 26 L. R., Jr., 428; Dulieu *v.* White (1901) 2 K. B., 669, 70 L. J. K. B., 837; Sloane *v.* Southern Cal. Ry. (1896) 111 Cal., 668, 44 Pac., 320, 32 L. R. A., 193. Defendant's misconduct consisted in tortiously ejecting (without using physical force), the plaintiff from a train. Insomnia and paroxysms resulted from humiliation and indignity. Watson *v.* Del. Co. (1902) 116 Ia,, 249, 89 N. W., 1068. Defendant wrongfully entered the house of plaintiff's husband, which was her home, and to the peaceful and quiet enjoyment of which she was legally entitled, and this invasion "produced physical injury to her through fright, resulting in nervous prostration." Cf. Ford *v.* Schliessmann (1900) 107 Wis., 479, 83 N. W., 761, limiting recovery to trespass to house. Turcell *v.* St. Paul &c, Ry. (1892) 48 Minn. 134, 50 N. W. 1034, 16 L. R. A., 203; Mack *v.* South &c. Ry. (1897) 52 S. C., 323, 29 S. E., 905, 40 L. R. A., 679, 68 Am. St. R., 913; Gulf, Cal, &c. Ry. *v.* Hayter (1900) 93 Tex., 239, 54 S. W., 944, 77 Am. St. R., 856, 47 L. R. A., 325.

[2] This doctrine has been applied in a case when the dead body of plaintiff's child was negligently, but not wantonly, thrown from a wagon, by a collision between defendant's train and the wagon. Hockenhammer *v.* Lex. &c., Ry. (Ky. 1903) 74 S. W. 222.

[3] Smith *v.* Johnson & Co., unreported but cited and approved in [1901] 2 K. B., at p. 675; Mahoney *v.* Dankwort (1899) 108 Ia. 321, 79 N. W. 134; Kansas City Ry. *v.* Dalton (1902) 65 Ks. 661, 70 Pac. 645; Buckman *v.* Great Nor. Ry. (1899) 76 Minn. 373, 79 N. W. 98; Sanderson *v.* Nor. Pac. Ry. (Minn. 1902) 92 N. W. 542.

of the plaintiff although it may have caused him suffering."[1]

REASONS FOR DENYING REMEDY.

Courts which deny all remedy for fright, or like disturbances of the mind and nerves, assign one or both[2] of the following reasons for their holding: First, that physical suffering, sickness or permanent harm is not the probable or natural consequence of fright or nervous shock, in the case of a person of ordinary physical and mental vigor.[3] Hence, plaintiff's injury is declared to be, as a matter of law, not the proximate, but a remote result of defendant's wrongdoing. Second, that damages sustained by fright or nervous shock must be refused, because of the impracticability of satisfactorily administering any other rule.[4]

It is quite apparent that the courts which adopt the first of these reasons prefer an arbitrary rather than a logical test of remoteness. Even though it is admitted by the pleadings that by reason of defendants' negligence, plaintiff was subjected to great danger of being run down and killed by a railroad train, and by reason of the danger to which he was thus exposed, he was shocked, paralyzed and otherwise injured, these courts declare that the paralysis is a remote result of the negligence.[5] If, when subjected to such danger, plaintiff had jumped and fallen and the fall had shocked his nervous system so as to impair his health,[6] or

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[1] Larson *v.* Chase (1891) 47 Minn. 307, 50 N. W. 238, 28 Am. St. R. 370, 14 L. R. A. 85, holding that the surviving wife has the legal right to the possession of the dead body of her husband, and hence may recover damages for injuries to her feelings caused by defendant's wrongful mutilation of the body. S. P. in Meagher *v.* Driscoll (1868) 99 Mass. 281, 96 Am. Dec. 759.

[2] Mitchell *v.* Rochester Ry. (1896) 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. R. 604. See Chicago, &c. Ry. *v.* Caulfield (1894) 63 Fed. 396, 11 C. C. A. 552, with valuable note, pp. 556–583.

[3] Victorian Ry. Commr's *v.* Coultas (1888) 13 App. Cas. 222, 57 L. J. P. C. 69; Atchison, T. &c., R. *v.* McGinnis (1891) 46 Ks. 109; 26 Pac. 453; Kansas City Ry. *v.* Dalton (1902) 65 Ks. 661, 70 Pac. 645; Ward *v.* West Jersey Ry. (1900) 65 N. J. L. 383, 47 At. 561; Ewing *v.* Pittsburgh Ry. Co. (1892) 147 Pa. 40, 30 Am. St. R. 709, 14 L. R. A. 666, 23 At. 340.

[4] Braun *v.* Craven (1898) 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199, Spave *v.* Lynn, &c., Ry. (1897) 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512; Homans *v.* Boston Elevated Ry. (1902) 180 Mass. 456, 62 N. E. 737.

[5] Ward *v.* West Jersey Ry. (1900) 65 N. J. L. 383, 47 At. 561.

[6] Tuttle *v.* Atlantic City Ry. (1901) 66 N. J. L. 327, 49 At. 450, 88 Am. St. R. 491, 54 L. R. A. 582.

had resulted in serious harm to his knee,[1] the same courts would declare the injury *not* remote. That serious physical disorder is the every-day consequence of fright or nervous shock is a fact, not only established by modern science, but one which has long been accepted by the ordinary man.[2] It would seem, therefore, to fall within the category of natural and probable consequences.

The second reason assigned for denying recovery in cases now under consideration, does not appear to be entirely satisfactory, even to the courts which continue to apply it. The Supreme Court of Massachusetts has declared[3] recently:

"It is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. But where there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person there is no occasion to press further the exception to general rules. The difference between this case and the Spade Case[4] in its second presentation is that in the latter the defendant's wrong, if any, began with the battery and it was not responsible for the previous sources of fear; whereas here the defendant was responsible for the trouble throughout."

Law Does Value Feelings.

Moreover, all courts agree that when the defendant's misconduct causes a physical injury to plaintiff, however slight,[5] or, without physical harm, wrongfully invades his

[1] Buchanan *v.* West Jersey Ry. (1890) 52 N. J. L. 265, 19 At. 254.

[2] Gulf, Col. & S. F. Ry. *v.* Hayter (1900) 93 Tex. 239, 54 S. W. 944, 77 Am. St. R. 856, 47 L. R. A. 325, and authorities therein cited; Watson *v.* Dills (1902) 116 Ia. 249, 89 N. W. 1068.

[3] Homans *v.* Boston El. Ry. (1902) 180 Mass. 456, 62 N. E. 737, 91 Am. St. R. 324.

[4] Spade *v.* Lynn Ry. (1899) 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. R. 298.

[5] Canning *v.* Inhabitants of Williamstown (Mass. 1848) 1 Cush. 451. Warren *v.* Boston, &c., Railway Co. (1895) 163 Mass. 484, 40 N. E. 895. Consolidated Traction Co. *v.* Lambertson (1896) 59 N. J. L. 297, 36 At. 100. This doctrine seems to have been overlooked in Gulf, &c. Ry. *v.* Trott (1894) 86 Tex. 412, 25 S. W. 419, 40 Am. St. Ry. 866.

right of personal security,[1] or liberty[2] or reputation[3] he is entitled to have the jury estimate and assess the damages which he has sustained by reason of injured feelings. The objection, therefore, that the law cannot value mental pain or anxiety[4] and that a claim for injury to feelings is purely transcendental, belonging to the realm of fancy rather than of fact,[5] seems open to criticism. While damages for injury to feelings are frequently too shadowy and speculative to be properly measured,[6] this is no reason for denying their recovery in all cases. It may well be urged by defendants' counsel as a powerful reason for a verdict in his favor, or for a sharp scrutiny by an appellate court of a verdict against him. Beyond this, it should have no effect.[7]

MENTAL ANGUISH CAUSED BY ILLEGAL CONDUCT.

In most cases of this kind the defendant commits a tort towards the plaintiff, to which the mental anguish is incidental, such as an assault[8] or false imprisonment; and, as we have seen, the courts are substantially agreed in granting a recovery.[9] Occasionally, however, the very

[1] Head *v.* Georgia, &c. Ry. (1887) 79 Ga. 358, 7 S. E. 217, 11 Am. St. R. 434. Mabry *v.* City Elec. Ry. (1902) 116 Ga. 624, 42 S. E. 1025, 59 L. R. A. 590. Kline *v.* Kline (1902) 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397; Shepard *v.* Chicago, &c. Ry. Co. (1889) 77 Ia. 54, 41 N. W. 564; Croker *v.* Chicago and N. W. Ry. Co. (1875) 36 Wis. 657, 17 Am. R. 504; Willson *v.* Nor. Pac. Ry. (1893) 5 Wash. 621, 32 Pac. 468.

[2] Gibney *v.* Lewis (1896) 68 Conn. 392, 36 At. 799; Young *v.* Gormley (1903) 120 Ia. 372, 94 N. W. 922.

[3] Swift *v.* Dickerman (1863) 31 Conn. 285; Cole *v.* Atlanta, &c. Ry. (1897) 102 Ga. 474, 31 S. E. 107; Magouick *v.* W. U. Tel. Co. (1901) 79 Miss. 632, 31 So. 206.

[4] Lynch *v.* Knight (1861) 9 H. L. C. 577.

[5] Western Union Tel. Co. *v.* Ferguson (1901) 157 Ind. 64, 60 N. E 674, 54 L. R. A. 846 and cases cited.

[6] Mahoney *v.* Dankwart (1899) 108 Ia. 321, 79 N. W. 134; Wyman *v.* Leavitt (1880) 71 Me. 227, 36 Am. R. 303; Fox *v.* Bovkey (1889) 126 Pa. St. 164, 17 At. 604; Bovee *v.* Town of Danville (1880) 53 Vt. 183, 190; Turner *v.* Great Nor. Ry. (1896) 15 Wash. 213, 46 Pac. 243.

[7] Western U. T. Co. *v.* Ferguson (1901) 157 Ind. 64, 78 (Dissenting Opinion), 60 N. E. 1080; Mentzer *v.* W. U. Tel. Co. (1895) 93 Ia. 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. R. 294.

[8] Barbee *v.* Reese (1883) 60 Miss. 906 (defendant, while intoxicated, threatened to shoot plaintiff who fled and suffered miscarriage because of her fright) see cases cited in preceding paragraph.

[9] Razzo *v.* Vorin (1889) 81 Cal. 289, 22 Pac. 848; Preiser *v.* Wielandt (1900) 48 App. Div. 569, 62 N.Y. Supp. 890; Williams *v.* Underhill (1901) 63 App. Div. 223, 71 N. Y. Supp. 291; Hill *v.* Kimball (1890) 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618.

gist of the defendant's wrongdoing, so far as the plaintiff is concerned, is in frightening the plaintiff, or in causing him other mental or nervous disturbance. Here, too, the courts are disposed to uphold verdicts for damages, when the evidence shows clearly that the defendant acted wilfully or wantonly.[1]

In the last case, cited in the preceding note, the Supreme Court of North Carolina said :

"We are of the opinion than an action will lie for physical injury or disease resulting from fright or nervous shocks caused by negligent acts. From common experience we know that serious consequences frequently follow violent nervous shocks caused by fright, often resulting in spells of sickness, and sometimes in sudden death. Whether the physical injury was the natural and proximate result of the fright or shock is a question to be determined by the jury upon the evidence, showing the conditions, circumstances, occurrences, etc. But it must also appear that the defendant could or should have known that such negligent acts would, with reasonable certainty, cause such result, or that the injury resulted from gross carelessness or recklessness, showing utter indifference to the consequences, when they should have been contemplated by the party doing such acts.

In the case at bar, defendant company's servants acted with utter indifference to the plaintiff's safety, and knew that plaintiff was a woman, and that she and her little children lived and were in her house only sixty steps away and exposed to the danger; and, after being asked by her to direct the blasting so as not to throw the rocks upon her house, continued to blast, throwing the stones from the size of a gallon bucket down to small stones upon and through her house and into her yard and garden (depositing as much as a wagon load of rock in her yard and several wagon loads in her garden), making it necessary for her and her children to secrete them-

[1] Wilkinson *v.* Downton [1897] 2 Q. B. 57, 66 L. J. Q. B. 493 (defendant falsely told plaintiff that her husband had broken both legs, intending her to believe it. She did believe it and became seriously ill from the nervous shock it caused her); cf. Nelson *v.* Crawford (1899) 122 Mich. 466, 81 N. W. 335, where defendant was held not liable for frightening plaintiff, by way of a joke. He was harmlessly insane and acted without malicious motives or the intent to harm any one; Rice *v.* Rice (1895) 104 Mich. 371; 62 N. W. 833; at p. 381 the court approved the charge of the trial judge that plaintiff in a suit for the alienation of her husband's affections "was entitled to recover for mental anguish and suffering, mortification and embarrassment," due to defendant's misconduct. In Conklin *v.* Thompson (N. Y. 1859) 29 Barb. 218, defendant wilfully and without a license exploded fire crackers in a public street, intending to frighten plaintiff's horse. It was frightened and died immediately. A verdict for plaintiff was sustained on appeal. In Lee *v.* City of Burlington (1901) 113 Ia. 356, 85 N. W. 618, a demurrer was sustained to plaintiff's complaint, which sought recovery for the value of a horse frightened to death by defendant's negligent management of a steam roller in a city street. See Watkins *v.* Kaolin Manuf. Co. (1902) 131 N. C. 536, 42 S. E. 983, 60 L. R. A. 617.

selves in the basement behind a stack chimney, and even there they were in danger. From the fright and nervous shocks received from such blasting she testified that she was rendered almost helpless, and could not go about her daily duties, and could not keep on her feet to attend to her children, and has been affected ever since; that it has caused her female trouble out of its regular course. They, knowing that plaintiff was a woman, and knowing (or ought to have known of) the weaknesses of a woman should have contemplated the effects likely to be produced upon her by such danger and fright. We do not wish to be understood as holding that an action in a case like this would lie for mental suffering and anguish from which no physical injury or disease directly resulted, as that question is not squarely presented in this appeal."

In some jurisdictions, these damages are awarded as a punishment of the defendant rather than as compensation of the plaintiff.[1] The prevailing view, however, is that these damages, though not measurable by market values or price lists, are compensatory, and that the "amount is to be left to the sound discretion of the jury."[2]

Mental Anguish Caused by the Negligence of Telegraph Companies.

In many jurisdictions this is recognized as a distinct cause of action, independent of any physical injury to the plaintiff or of any malicious intent of the defendant, although the courts are not entirely agreed as to the ground upon which the right to damages is based. The pioneer case[3] on this topic declares, that when a telegraphic message announces the death of the plaintiff's parents or other near and dear relative, the natural result of negligence in delivering it, is to "inflict upon the mind the sorest disappointment and sorrow," and that the damages "resulting therefrom constitute general damages, recoverable under a general averment of damage." Emphasis was also laid upon the fact that telegraph companies exercise and enjoy special franchises and privileges under the law, which ought to subject

[1] Chappell *v.* Ellis (1898) 123 N. C. 259, 31 S. E. 709, 68 Am. St. R. 822.

[2] Young *v.* Gormley (1903) 120 Ia. 372, 94 N. W. 922, and cases cited. In McChesney *v.* Wilson (Mich. 1903) 93 N. W. 627, the court said: "Our understanding is that the rule in this state limits exemplary damages to the aggravation of the injury to feelings which arises from malice, and does not permit damages for the purpose of punishment." Gillespie *v.* Brooklyn Heights Ry. (1904) 178 N. Y. 347, 70 N. E. 857.

[3] So Relle *v.* W. U. T. Co. (1881) 55 Tex. 308, 40 Am. R. 805.

them to a duty of care, over and above their contract obligation. A breach of this duty, it is declared by most courts which have followed this Texas decision, is a common law tort, subjecting the tort-feasor to at least nominal damages; and, when the message is such as fairly to apprise him of the mental suffering which will naturally follow the failure to deliver it, damages for such suffering are recoverable upon the same principle that gives them in cases of wrongful ejection from a train, or false imprisonment, or of assault, unattended with actual bodily injury or pain.[1]

Whether the message does fairly apprise the telegraph company that mental anguish will naturally and proximately follow negligence in delivery, is often a troublesome question.[2] The practical difficulties attendant upon answering it have led some courts to retreat from the Texas leadership, and join the more conservative side.[3] A few courts permit a recovery for mental suffering, only when the conduct of the telegraph company is wanton or grossly negligent.[4]

A nice question, in the conflict of laws, has arisen in some of these cases. In the state where the telegram is received for transmission, the law does not allow damages for mental anguish; while they are allowed in the state where the message is deliverable. If the failure to deliver causes the sender mental anguish, and he sues in the jurisdiction where the message was deliverable, is his right of action deter-

[1] Western U. T. Co. *v.* Henderson (1889) 89 Ala. 510; Mentzer *v.* W. U. T. Co. (1895) 93 Ia. 752, 62 N. W. 1, 28 L. R. A. 72; Chapman *v.* W. U. T. Co. (1890) 90 Ky. 265, 13 S. W. 880; Graham *v.* W. U. T. Co. (1903) 109 La. 1069, 34 So. 91; Young *v.* W. U. T. Co. (1890) 107 N. C. 384, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. R. 883; Wadsworth *v.* W. U. T. Co. (1888) 86 Tenn. 695, 8 S. W. 574, 6 Am. S. R. 864; Stuart *v.* W. U. T. Co. (1886) 66 Tex. 580, 18 S. W. 351, 59 Am. R. 623. This doctrine has received legislative sanction in some states, see Marsh *v.* W. U. T. Co. (1902) 65 S. C. 430, 43 S. E. 953, applying the statute of 1901, Sess. L. p. 693.

[2] In W. U. T. Co. *v.* Ayers (1901) 131 Ala. 391; 31 So. 78; 90 Am. S. R. 92, a message calling an uncle to the death bed of a nephew was not notice that damages would ensue; while in W. U. T. Co. *v.* Crocker (1902) 135 Ala. 492, 33 So. 45, 59 L. R. A. 398, a message to a grandmother was notice, cf. Robinson *v.* W. U. T. Co. (Ky. 1902) 68 S. W. 656, 57 L. R. A. 611; message related to sending money; mental anguish not recoverable.

[3] W. U. T. Co. *v.* Ferguson (1901) 157 Ind. 64, 60 N. E. 674, 54 L. R. A. 846.

[4] W. U. T. Co. *v.* Lawson (1903) 66 Kan. 460, 72 Pac. 283; Butler *v.* W. U. T. Co. (1901) 62 S. C. 223; 40 S. E. 162, and see W. U. T. Co. *v.* Seed (1896) 115 Ala. 670, 22 So. 474.

mined by the law of the first or the second jurisdiction? The law of the latter jurisdiction has been held to govern, and this decision seems to be correct.[1]

TEXAS DOCTRINE GENERALLY REJECTED.

The weight of judicial authority is opposed to the Texas doctrine, and denies a recovery of damages for mental anguish only, resulting from negligent failure to deliver a telegraphic message. The principal reasons assigned for this view are: that damages for mental suffering alone were never allowed at common law; that such damages must be uncertain, indefinite and speculative, and open "into a field without boundaries," and that "the mental anguish doctrine awards damages for a state of mind that is not at all dependent upon or measurable by a cause of action, existing outside the mental contemplation of the plaintiff, and provable by evidence of both parties."[2]

The extreme, to which the Texas doctrine carries a court that once gets fairly astride of it, is shown by two recent cases in North Carolina.[3] Dr. Green, of Weldon,

[1] Gray *v.* W. U. T. Co. (1901) 108 Tenn. 39; 64 S. W. 1063; 56 L. R. A. 301, and valuable note on the topic, cf. W. U. T. Co. *v.* Waller (1903) 96 Tex. 589, 74 S.W. 751, holding that such damages are recoverable in the state from which the message was sent, although the law of the state in which the message was deliverable did not allow them.

[2] Peay *v.* W. U. T. Co. (1898) 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463; Russell *v.* W. U. T. Co. (1884) 3 Dak. 315, 19 N. W. 408; Internat. O. T. Co. *v.* Saunders (1893) 32 Fla. 434, 14 So. 148, 21 L. R. A. 810; Chapman *v.* W. U. T. Co. (1892) 88 Ga. 763, 15 S. E. 901, 30 Am. St. R. 183, 17 L. R. A. 430, W. U. T. Co. *v.* Ferguson (1901) 157 Ind. 64, 60 N. E. 674, 54 L. R. A. 846; overruling Reese *v.* W. U. T. Co. (1889) 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; Francis *v.* W. U. T. Co. (1894) 58 Minn. 252, 59 N. W. 1078, 49 Am, St. R. 507, 25 L. R. A. 406; W. U. T. Co. *v.* Rogers (1891) 68 Miss. 748, 9 So. 823, 13 L. R. A. 859, and note, 24 Am. St. R. 300; Connell *v.* W. U. T. Co. (1893) 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. R. 575; Morton *v.* W. U. T. Co. (1895) 53 Ohio St. 431, 41 N. E. 689, 32 L. R. A. 735, 53 Am. St. R. 648; Butner *v.* W. U. T. Co. (1894) 2 Okl. 234, 37 Pac. 1087, Connelly *v.* W. U. T. Co (1902) 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663; Davis *v.* W. U. T. Co. (1899) 46 W. Va. 48, 32 S. E. 1026; Summerfield *v.* W. U. T. Co. (1894) 87 Wis. 1, 57 N. W. 973, 41 Am. St. R. 17, W. U. T. Co. *v.* Wood (1893) 57 Fed. 471, 13 U. S. App, 317, 6 C. C. A. 432, 21 L. R. A. 706; Stansel *v.* W. U. T. Co. (1900) 107 Fed. 668; Western U. T. Co. *v.* Sklar (1903) 126 Fed. 295, a case containing a valuable collection of authorities on this topic.

[3] Green *v.* Western Union Tel. Co. (1904) 49 S. E. 165, with extensive résumé of recent cases, for and against the Texas doctrine; Green *v.* Western U. T. Co. (1904) 49 S. E. 171. See Barnes *v.* West. U. T. Co. (Nev. 1904) 76 Pac. 931, 65 L. R. A. 666, holding that "damages are recoverable for mental suffering caused by a tort, whether in connection with physical suffering or not."

N. C., telegraphed to a friend in Columbia, S. C., that his daughter would reach Columbia about midnight, and asking the friend to meet her. Through the negligence of the telegraph company's agent, at Columbia, the message was not delivered. Accordingly, no one met the daughter. The conductor of the train put her in charge of the colored matron at the Columbia station, who secured a hack, and after some delay the daughter, a girl of sixteen, was driven to the friend's residence. The daughter sued the telegraph company for the mental anguish which she suffered, in consequence of its negligent failure to deliver the telegram. The father also sued for the mental anguish, which he suffered, when told by the company's agent, the next day, that the message had not been delivered. The company demurred to each complaint, and the trial judges sustained the demurrer in each case. On appeal however, the Supreme Court reversed the decisions, and held that each complaint stated a cause of action. It declared that the negligent failure of the company to deliver the message was a breach of a duty, imposed upon it by law, and that the mental anguish of each plaintiff was the direct result of the defendant's breach of legal duty.[1] To what degree either plaintiff suffered, and "whether a person of reasonable firmness should have suffered at all, under the circumstances," the court said "are questions for the jury." But the court was probably aware, that the jury ordinarily answers such questions against the company.

In North Carolina, the "undoubted rule," stated in the early part of this article, will not apply to actions against telegraph companies, if the doctrine of the cases, last referred to, is maintained.

FRANCIS M. BURDICK.

[1] At p. 170 the court said, "When we remember that this doctrine, of mental anguish in telegraph cases, is of recent origin, having theretofore been deemed contrary to the principles of the common law, and has made progress in opposition to the preconceived ideas of courts and juries, it seems that it must possess much inherent strength and merit."